No. 93-1994

JUL 19 1994

In The

Supreme Court of the United States

October Term, 1994

HAY'S WESTERN WEAR, INC.,

Petitioner,

versus

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the construction activities of the Louisiana Department of Transportation and Development constitute a "taking" of private property for public use without compensation as forbidden under U.S. Constitution, Amendment V?

II.

Should this Court consider the "standard of review" applied by the Louisiana Third Circuit Court of Appeal in this case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Constance v. State of LA, DOTD, 626 So. 2d 1151 (La. 1993) 6, 9

Hay's Western Wear v. State, DOTD, 624 So. 2d 975 (La. App. 3rd Cir. 1993) 2, 3

Hay's Western Wear v. State, DOTD, 631 So. 2d 452 (La. 1994) 3

LeBlanc, Et Al v. State, DOTD, No. 93-1994, U.S. Supreme Court 12

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 7, 8, 9, 10

Ramelli v. City of New Orleans, 96 So. 2d 572 (La. 1957) 9

Reymond v. State, Dept. of Hwys., 231 So. 2d 375 (La. 1970) 6

STATUTES

U.S. Const. Amend. V ..... *passim*

La. Const. Art. 1 §4 6

28 USCS 1257 11

STATEMENT OF THE CASE

This matter involves an inverse condemnation claim by petitioner for alleged business losses arising out of the State's construction activities in a rural area. The original petition was filed in State Court on November 28, 1983. There were other defendants initially, but those defendants were dismissed prior to trial. The only remaining defendant at trial was the Louisiana Department of Transportation & Development.

The construction work which allegedly caused plaintiff's damages herein took place between April of 1981 and April of 1983. The construction project undertaken by the State covered a 5.1 mile stretch of rural state highway near the City of Lake Charles, Louisiana. The project included the widening and overlay of approximately 4 1/2 miles of that stretch and the complete reconstruction of an additional 1/2 mile. Also involved in the project was the reconstruction and/or replacement of two bridges, one of which was located to the North of Hay's Western Wear and the other to the South of Hay's Western Wear.

Prior to and during construction, petitioner operated a retail establishment known as Hay's Western Wear. It was located approximately in the middle of the 5.1 mile project. Since the construction was accomplished entirely within the State's existing right of way, there was no need to expropriate any property from petitioner. There was no physical utilization of any of petitioner's property during construction. Petitioner contends that the construction interrupted its business by making the store less accessible; yet during and after construction, the store was

always open for business and ingress and egress to the business premises were *always* available.

Trial on the merits was held in the Louisiana District Court on January 16 and 17 of 1991. On June 1, 1992, the Trial Judge rendered a judgment awarding business losses to Hay's Western Wear. The Trial Judge found that the construction had aversely impacted the business between October of 1981 and September of 1982. This decision was appealed by the State to the Louisiana Third Circuit Court of Appeal. On October 6, 1993, that Court reversed the ruling of the Trial Court and held that no damages were due as a result of the State's construction activities.[1] The opinion includes the facts upon which the Louisiana Court of Appeal based its decision that no damages were due.

> "During the period of construction, access to Hay's was blocked either from the North or South, and for a period in both directions along Hwy. 397. However, at all times alternate access was available to Hay's, via gravel farm roads in the area. The official state detour bypassed the area by access to other state roads, while actual access to Hay's at times required utilization of local roadways." *Hay's* at pg. 976.
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> "Aside from occasional instances, the plaintiff experienced no problem with maintenance of its driveways during the period. The driveways were gravel before construction and were maintained in that condition by DOTD during construction." *Hay's* at pg. 976.

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[1] *Hay's Western Wear v. State, DOTD*, 624 So. 2d 975 (La. App. 3rd Cir. 1993).

> "Extensive testimony at trial revealed that at no time was access to Hay's completely blocked. In fact, in most instances access was available from either the North or South on Hwy. 397 itself. At other times, access was available, though inconvenient, by means of various local roadways." *Hay's* at pg. 977.
>
> "However, the record is devoid of evidence to suggest that the conduct of DOTD was excessive or abusive. Furthermore, it is clear that the inconvenience experienced by Hay's was not unique to it, but was experienced by the public at large in the area. Finally, Hay's access to its business was never completely blocked. As such, Hay's experienced no substantial interference with its access to its premises which is compensable under our law." *Hay's* at pg. 977.

Petitioner applied for a writ of certiorari to the Louisiana Supreme Court wherein it sought to have the judgment of the Trial Court reinstated. The Louisiana Supreme Court refused to review the ruling of the Third Circuit Court of Appeal.[2]

The most relevant facts for the purpose of argument to this Court are: 1) there was no property expropriated from petitioner; 2) there was no physical utilization of petitioner's property during construction; 3) petitioner was able to continue to operate as a retail store continuously during construction; 4) customers were able to get to petitioner's store continuously during construction; 5) the store continued to operate as a retail store after the

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[2] *Hay's Western Wear v. State, DOTD*, 631 So. 2d 452 (La. 1994).

completion of construction; 6) the State exercised no control over petitioner's property or the business conducted thereon before, during or after construction; and, 7) the property continued to be utilized in the same manner during and after construction as it did before, namely as a retail operation known as Hay's Western Wear.

SUMMARY OF ARGUMENT

In this inverse condemnation case, petitioner alleges that the denial of recovery by the Louisiana Third Circuit Court of Appeal constitutes a denial of its right under the Fifth Amendment to the U.S. Constitution. In order to recover under the Fifth Amendment for damages when there has been no formal expropriation or physical invasion of the property, this Court has recently held that the governmental action complained of must result in the denial of all economically beneficial or productive use of the property to the landowner. This Court has further held that even if such governmental regulation or activity denies all economically beneficial or productive use, the landowner may still not recover if the action complained of was a legitimate exercise of the police power of the governmental entity which pre-existed the landowner's ownership of the property.

In this case, the governmental activity complained of was the construction activity necessary to accomplish the project undertaken by the Louisiana Department of Transportation & Development. These activities were conducted solely within the confines of existing right of

way owned by the Louisiana Department of Transportation & Development. There was no formal expropriation from petitioner and there was no physical invasion of the property. During the period of construction, the petitioner enjoyed access to abutting streets from its property and continued to utilize the property in the conduct of its retail business throughout. There has, therefore, been no taking of its property under the Fifth Amendment to the U.S. Constitution.

Alternatively, petitioner argues that the Louisiana Third Circuit Court of Appeal applied an inappropriate standard of review in overturning the award by the Trial Judge. That same argument was advanced to, and rejected by, the Louisiana Supreme Court. The argument does not raise or involve any federal question nor any constitutional issues under the U.S. Constitution or the Louisiana Constitution. Since no federal question is raised by this additional argument, it does not merit this Court's consideration. There is no basis for the granting of this writ application by this Court.

ARGUMENT

Since no formal expropriation took place in this matter, petitioner's theory of recovery in the Louisiana courts was that the construction activities of the Louisiana Department of Transportation & Development amounted to an inverse condemnation which had caused it to suffer business losses. The Louisiana courts have for many years recognized the right of recovery in appropriate circumstances for an inverse condemnation for the taking

or damaging of property other than by formal expropriation proceedings under Article 1, Section 4 of the Louisiana Constitution of 1974, as well as under its predecessor.[3] In a recent case,[4] the Louisiana Supreme Court again recognized the existence of an inverse condemnation right of action under the Louisiana Constitution of 1974. In the *Constance* case, the Louisiana Supreme Court went to great lengths to reconfirm the availability of the remedy and the conditions which must exist for damages to be recovered for an inverse condemnation. The Court made it clear that recovery will not be allowed in every situation in which damages occur, but only in those situations in which the State has caused physical damage to property or where the State's activity is deemed to have been excessive or abusive. Having found neither physical damage to petitioner's property nor excessive or abusive conduct by the Louisiana DOTD in this case, the Third Circuit Court of Appeal held that petitioner was not entitled to recover any damages it may have sustained. By denying petitioner's writ application, the Louisiana Supreme Court agreed.

In its writ application to this Court, petitioner now contends that the guidelines set forth by the Louisiana Supreme Court for recovery in inverse condemnation situations, as followed by the Louisiana Third Circuit Court of Appeal in this case, are contrary to rights set out under Amendment V to the United States Constitution.

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[3] *Reymond v. State, Dept. of Hwys.*, 231 So. 2d 375 (La. 1970).

[4] *Constance v. State of La., DOTD*, 626 So. 2d 1151 (La. 1993).

IS PETITIONER ENTITLED TO DAMAGES UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

This Honorable Court recently re-examined what governmental activities would constitute a "taking" other than the formal expropriation of property.[5] While the *Lucas* case dealt with regulatory takings, the rationale should be the same for other governmental activities, such as construction, which indirectly impact landowners. In *Lucas* this court again repeated that it has avoided any set formula for determining when a governmental regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

> "We have, however, described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.
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> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not

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[5] *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992).

> substantially advance legitimate state interests or denies an owner economically viable use of his land'." *Lucas*, supra at p. 2893.

In the instant case, there was no "physical invasion" of petitioner's property. Thus, there has been no taking under the first category referred to above. Neither has there been a taking under the second situation described above. The State of Louisiana had a legitimate state interest in the widening and reconstruction of this rural state highway. Furthermore, the construction undertaken to accomplish those purposes did not deny the petitioner economically viable use of its property. As stated previously and as acknowledged by the Louisiana Court of Appeal, the petitioner continued to utilize the property during and after construction for the same purpose and in the same manner as it did prior to the construction. While petitioner may decry the test applied by the Louisiana Supreme Court of "abusive or excessive conduct" in the absence of physical damage by the State, that standard is surely no more harsh than the requirement imposed by this court that the governmental actions must result in a total loss of use of the property. Regardless of whether or not the standard applied by the Louisiana Supreme Court may in some other particular instance abridge the right to compensation of a landowner under the Fifth Amendment to the United States Constitution, it is obvious under the facts of *this* situation that the holding of the Louisiana Court of Appeal is not in conflict with the holding of this Court in *Lucas* and other similar cases.

Furthermore, the actions of the State in widening and reconstructing this rural state highway, while still maintaining access from the property to an abutting roadway, was a legitimate exercise of the police power of the State which existed long before petitioner herein acquired use of the property. This was clearly recognized and set out by the Louisiana Supreme Court in *Constance*, supra:

> "Furthermore, it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability. *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957). While recognizing that commercial property owners were inconvenienced by the narrowing of a major traffic artery to construct an overpass and by the diversion of traffic some 3000 feet, the Ramelli court noted that the inconvenience was common to all property owners within the same vicinity. Accordingly, the court affirmed the ruling of the trial court that the plaintiff's had sustained a loss without an injury in the legal sense. Similarly, other jurisdictions have concluded that a property owner has no protectible interest in such traffic flow, as opposed to access." *Constance v. State*, supra at p. 1156.

This Court recognized in *Lucas*, as it had on prior occasions, that the State's use of these pre-existing police powers does not give rise to compensation.

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

> This accords, we think, with our takings jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas*, supra at p. 2899.

The petitioner in this case cannot even approach the threshold for compensation set by this Court in *Lucas*. While it may have sustained some inconvenience during construction, that inconvenience was caused by a legitimate application of the police power enjoyed by the State over its own right of way; furthermore, it continued to enjoy the full use of the property during and after construction despite this inconvenience.

SHOULD THIS COURT CONSIDER THE STANDARD OF REVIEW APPLIED BY THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IN THIS CASE?

A significant portion of the petition for a writ of certiorari filed herein deals with the argument that the Louisiana Third Circuit Court of Appeal committed error in its review of the record. In other words, petitioner argues that the Court of Appeal applied an improper standard of review in reversing the Trial Court. This same argument was made to, and soundly rejected by, the

Louisiana Supreme Court. The jurisdiction of this Court to review state court judgments by writ of certiorari is authorized by 28 USCS 1257. Review is allowed under that statute where the final judgment of the state court (1) deals with the validity of a treaty or statute of the United States; or (2) challenges the validity of a state statute on the ground that it is repugnant to the Constitution, treaties, or laws of the United States; or, (3) where any right is specially set up or claimed under the Constitution or the treaties or statutes of the United States. Rule 10 of the Rules of the Supreme Court indicate that a writ of certiorari will only be granted from a judgment of a state court when that court has decided an important question of federal law which has not been, but should be, settled by this court, or where the decision conflicts with applicable decisions of this Court.

The standard of review applied by Louisiana's courts of appeals to the review of lower court judgments is not such an issue as contemplated above. What standard of review is applied by the Louisiana courts and how they apply it to a particular case does not raise any federal question and should not be considered by this Court. The only possible federal question raised by the petition filed herein is whether or not the final judgment rendered by the Louisiana courts have violated the petitioner's rights under the Fifth Amendment to the Constitution. That issue has already been dealt with above.

CONCLUSION

This Court has recently considered and rejected virtually identical arguments in *LeBlanc, et al. v. State of Louisiana, through the Department of Transportation & Development*, No. 93-1994. The petition for a writ of certiorari in that case was denied on June 20, 1994. The only difference in the two cases is the setting, i.e. the construction in *Constance* was in the urban metropolitan New Orleans area, while the construction in this case occurred in a rural area. In all other respects, the important facts and law applied are identical. This writ application should be similarly rejected.

Respectfully submitted,

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